

**REPORT OF THE TASK FORCE ON THE ONTARIO
ENVIRONMENTAL BILL OF RIGHTS:
SUPPLEMENTARY RECOMMENDATIONS**

DECEMBER, 1992

FINAL



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g) *Part VII - Employer Reprisals*

This part expands protection to workers who "blow the whistle" on polluting employers. Complaints may now be made to the Ontario Labour Relations Board where employers have taken action against employees who participate in any activity under the EBR such as exercising any public participation rights or requesting a review or investigation.

A labour relations officer or the Board conducts an inquiry into the complaint. If the Board agrees that an employer did take improper action against an employee, the Board will order the employer to cease doing the acts in the complaint, or rectify them, reinstate the employee, with or without salary for lost wages, or compensate the employee for loss of earnings.

3. Report on Government Response to Public Comments on EBR

The Ministry of Environment and Energy will be preparing a response to the public comments received since the Task Force released its first report in July of last year. This report will be made available during the summer, 1993.

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CHAPTER 1: BACKGROUND AND MANDATE OF THE TASK FORCE

On July 8, 1992, the Report of the Task Force on the Ontario Environmental Bill of Rights was tabled in the Ontario Legislature by the Honourable Ruth Grier, Minister of the Environment. The Report contained a detailed discussion of the recommendations of the Task Force and a proposed Environmental Bill of Rights. At that time, the Minister of the Environment announced her intention to undertake public consultation to increase public understanding of the Bill and to gather comments and suggestions. (See Appendix A - News Release, Ministry of the Environment, July 8, 1992).

The Report of the Task Force, an overview of its recommendations, public information materials and copies of the proposed Environmental Bill of Rights itself were made available free of charge to the public. Members of the public were invited to submit written comments on the proposed Bill between July 8 and October 16, 1992.

In November of 1992, the Task Force reconvened and met on nine occasions to consider the comments that had been received from the public. In addition, prior to reconvening, individual members of the Task Force met on numerous occasions with groups interested in the recommendations of the Task Force. Direct meetings were held with representatives of environmental groups, labour, the agricultural community, business, the resource industry and government among many others.

During its meetings, the Task Force revisited the original recommendations and reviewed the public comment in an effort to give each suggestion for change careful consideration and to improve, wherever possible, the recommendations tabled in the Legislature on July 8, 1992.

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Appendix B to this Supplementary Report contains a list of the names of organizations that made submissions to the Minister of the Environment with respect to the Report of the Task Force between July 8, 1992, and November 30, 1992.

Members of the Task Force had available to them copies of each submission, as well as summaries and analyses of these submissions prepared by Ministry officials. All eight parts of the proposed Environmental Bill of Rights were reviewed in light of the public comment. What follows are the Task Force's unanimous recommendations for improvements to the proposed Bill of Rights and related comments. Appendix C provides a summary of the Task Force's Supplementary Recommendations.

**CHAPTER 2: THE PROPOSED ENVIRONMENTAL BILL OF RIGHTS: SUPPLEMENTARY
RECOMMENDATIONS**

Introduction

In this chapter the Task Force sets out recommendations for changes to the proposed Environmental Bill of Rights as it appeared in the Report released on July 8, 1992. Explanatory notes are included where necessary to clarify the recommended change. In some cases explanatory notes are included to explain why a particular change is not being recommended.

The Task Force also noted that some of the public comments indicated that the original report and draft bill could have been clearer with respect to some of its intended effects. In such instances explanatory notes have been included.

In some cases the Task Force has included in this Supplementary Report suggesting wording for amendments to the Bill of Rights as proposed. These are suggestions only, offered as a guide to Legislative Counsel.

Part I: Preamble, Definitions and Purposes

Preamble

The Task Force recommends that the preamble to the Bill be re-drafted to include a reference to the concept of remediation in the first paragraph and that the word "our" be replaced with the word "the" where it appears before the words "natural environment" in the first line. This reduces the anthropocentric flavour of the proposed draft.

A new paragraph should be added to the preamble stating that the people of Ontario have the right to a healthful environment and that the environment has an inherent value.

These changes complement a proposed amendment to Section 2(1), of the "Purposes", discussed below.

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As a result of the above suggestions the Task Force recommends that the preamble be redrafted to reflect the following concepts:

- "The people of Ontario recognize the inherent value of the natural environment.
- The people of Ontario have the right to a healthful environment.
- The people of Ontario have as a common goal the preservation, protection and remediation of the natural environment for the benefit of present and future generations.
- While the government has the primary responsibility for achieving this goal, the people should have the means to ensure that it is achieved in an effective, timely, open and fair manner." (Supplementary Recommendation 1)

Definitions

Air:

A number of submissions were received urging the Task Force to amend the definition of "air", or to delete it, in order to ensure the application of the Environmental Bill of Rights to what is known as "indoor air" or the "indoor environment". The Task Force considers the indoor air issue to be one that may call for further consideration by government. However, the handling of this issue requires further study to determine the best approach to dealing with it in the context of environmental protection. No consensus emerged among Task Force members for change to the definition of "air" as it appears in the proposed Environmental Bill of Rights.

Environment:

Several submissions were received urging the Task Force to alter or amend the definition of "environment", for example, to bring it into uniformity with the Environmental Protection Act or the Environmental Assessment Act. The definition proposed by the Task Force is broader than that contained in the Environmental Protection Act, but narrower than that of the Environmental Assessment Act. This choice was intentional as the Task Force intends the

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Environment Bill of Rights to be directed primarily to protection of the natural environment, including its ecosystems.

Instrument:

The Task Force recommends changing the definition of "instrument" in Section 1 so that the word "prescribed" is inserted before the word "Act" in the first line of the definition. (Supplementary Recommendation 2)

Wetland:

The Task Force was urged to replace the proposed definition of "wetland" in section 1 with a definition from the policy guidelines of the Ministry of Natural Resources. The Task Force, therefore, recommends that "wetland" be amended to exclude lands being used for agricultural purposes, that are periodically "soaked" or "wet". (Supplementary Recommendation 3)

The Task Force recommends that the other definitions in Section 1 remain as originally proposed.

Purposes of the Act

Section 2(1)(a) states that one of the purposes of this Act is "... to protect, conserve and, where reasonable, restore the integrity of the environment as provided in this Act." As a result of submissions received, the Task Force wishes to clarify that the words "where reasonable" were added to underline the fact that a number of factors will need to be considered in implementing this purpose of this Act in relation to restoring the natural environment. It should also be understood that the Environmental Bill of Rights is not designed to replace or preclude the operation of other environmental laws in Ontario. It is designed to complement existing law. The Task Force recommends that Section 2(1)(a) remain as originally proposed.

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The Task Force recommends that the words "for the benefit of present and future generations" in section 2(1) (b) (c) be deleted. (Supplementary Recommendation 4) This change is intended to reflect the acceptance of submissions that the Bill of Rights should not be focused entirely on human use and enjoyment of the environment, but should recognize that the environment itself has an inherent value. The reference to "present and future generations" in the preamble, the Task Force feels, is sufficient.

The Task Force also recommends that section 2(1) (c) be amended to state that "The purposes of this Act are ... (c) to set out the means by which the people of Ontario may act to protect their right to a healthful environment as provided in this Act". (Supplementary Recommendation 5) The Task Force sees this proposed change as being complementary to the changes recommended for the Preamble acknowledging the right of the people to a healthful environment and their recognition of its inherent value.

The Task Force considered submissions that the words "unreasonable threat" in section 2(1)1 represented too high a standard for environmental protection. Task Force members discussed suggestions to amend or remove these words but no consensus emerged among Task Force members to change the existing wording.

The Task Force considered submissions that urged inclusion of the word "use" in Section 2(2)4. The Task Force is of the opinion that the concept of "management" of natural resources includes the "use" of natural resources as described in this Part.

All other provisions in Section 2 should remain as originally proposed by the Task Force.

Part II: Public Participation in Government Decision Making

The Task Force considered submissions concerning the preparation of Ministry Statements of Environmental Values and was persuaded that time limits should be established for the completion of these statements by the various Ministries.

The Task Force recommends that sections 5, 6, and 7 be amended to impose time limits on Ministries in the preparation of Statements of Environmental Value. The following amendments, worded approximately, are recommended:

- Within three months after the date upon which this Part applies to a Ministry, the Minister shall develop a Ministry statement of environmental values that, ...
 - (1) Within the time referred to in section 5, the Minister shall give notice to the public that he or she is developing the Ministry statement of environmental values.
 - (2) The notice shall include any information that the Minister considers appropriate and shall invite comments from members of the public on what should be in the statement.
 - (3) The period for comment shall be no less than 30 days.
 - (4) The Minister may extend the period for comment where, in his or her opinion, a longer period for comment is necessary having regard to,
 - (a) the complexity of the proposed statement of environmental values;
 - (b) the level of public interest in the statement of environmental values;
 - (c) the period of time the public may require to make informed comment; or
 - (d) other factors the Minister may consider relevant.
 - (1) Within three months after notice of intent to develop a Statement of Environmental Values is given under section 6, the Minister shall give notice of the statement to the public.

(2) The notice shall include a brief explanation of the effect, if any, of comments from members of the public on the development of the statement and any other information that the Minister considers appropriate."

(Supplementary Recommendation 6)

The development of a Statement of Environmental Values should be treated as a proposed policy that is placed on the Registry for Notice and comment.

The Task Force recommends that the word "considered" in the first line of section 5(a) be changed to "applied", so that it would now read, " ... (a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the Ministry ... ".

(Supplementary Recommendation 7)

The Task Force recommends that the words "consideration of" be deleted from the first line of section 5(b). (Supplementary Recommendation 8)

Various submissions suggested to the Task Force that either environmental considerations or economic considerations in a Statement of Environmental Values would be given more weight than other considerations used by Ministries in making significant environmental decisions. The Task Force wishes to emphasize that a Statement of Environmental Values is not intended to set priorities. Rather, it should integrate environmental considerations into existing social, economic and scientific considerations. It is not intended that environmental considerations be given more weight than scientific considerations; nor should social considerations be given more weight than environmental considerations. These are all factors that must be weighed in reaching a sound decision.

The Task Force wishes to stress the need for, and importance of, public consultation and negotiation of the Statements of Environmental Values by those who are interested in and likely to be affected by such statements as contemplated by section 6(2).

The Task Force wishes to emphasize that the purpose of the Environmental Registry is to provide a minimum level of reasonable notice to the public of proposed decisions that might have a significant affect on the environment. The amount of notice required may vary from issue to issue and from consideration of policies as opposed to regulations as opposed to specific instruments. The electronic registry proposed in this part of the Bill is a minimum standard for prescribed Acts. It is contemplated that other forms of notice will be used from time to time as well to ensure appropriate participation in significant environmental decision making. It is not intended that the Registry displace existing legislative requirements for notice that meet or exceed the Bill's standards. Duplication of notice requirements should be eliminated.

The Task Force recommends that the minimum requirements for policies, acts and regulations on the Registry be set out expressly in the Bill and suggests the following amendments be added to Part II:

"Policies, Acts

- The period for comment on a proposal for a policy or Act shall be no less than 30 days.
- The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.
- The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.

Regulations

- The period for comment on a proposal for a regulation shall be no less than 30 days.
- The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.

- The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.
- The Minister may require the preparation of a Regulatory Impact Statement where in his or her opinion, the statement is necessary to permit meaningful public consultation on the proposal.
- A Regulatory Impact Statement shall include,
 - (a) a brief statement of the objectives of the proposed regulation;
 - (b) a preliminary assessment of the environmental and economic impacts of the proposed regulation; and
 - (c) the reasons why regulation is the preferred means to achieve the desired environmental objective."(Supplementary Recommendation 9)

Section 13(1) contains a reference to "significant impact on the environment". The Task Force wishes to clarify its intention that significant impact could include cumulative effects on the environment.

As a result of comments received from the government the Task Force reconsidered the recommended classification scheme for instruments. The Report released July 8, 1992 proposed a four class scheme. It appears that the Task Force's goals could be achieved more simply with a three class scheme that merges the earlier Classes II and III into a new Class II. Class III in the new approach would be the equivalent of the earlier Class IV.

The Task Force recommends that the classification scheme for instruments be incorporated in the Bill and proposes sections, approximately worded, for consideration:

INSTRUMENTS

Proposal for Regulation for Prescribing Instruments

- The Minister, with the consent of the Lieutenant Governor in Council, may make a regulation prescribing

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significant environmental instruments issued or made under prescribed Acts and assigning each prescribed instrument or subgroup of prescribed instruments to a class for purposes of public participation.

Prescribed Instruments: Criteria

- In forming an opinion as to whether an instrument is a significant environmental instrument which should be prescribed under the Act, the Minister may consider the following:
 - (a) the potential for the activity controlled by the instrument to contaminate or degrade the environment;
 - (b) the probable geographic extent of any significant adverse environmental impact;
 - (c) the potential public interest in the activity controlled by the instrument under consideration;
 - (d) the level of provincial government interest in the activity to be controlled by the instrument under consideration; and
 - (e) any other factor the Minister deems relevant.

Classification of Prescribed Instruments

- Prescribed instruments or a subgroup of prescribed instruments shall be classified into one of Class I, Class II or Class III for the purposes of public participation requirements.

Class I Prescribed Instruments: Criteria

- A Class I prescribed significant instrument or subgroup of prescribed instruments controls activity which, in the Minister's opinion, has the following general characteristics:
 - (a) the risk of contamination or degradation by the activity is limited because preventative and mitigative measures are routine and effective;
 - (b) the geographic extent of any contamination or degradation of the environment would be of local significance;
 - (c) there is little public interest in the activity beyond the local community; and
 - (d) the level of provincial government interest in the activity is low to moderate.

Form of Comment

- Any person may submit comment on the proposal for a Class I instrument in the manner prescribed by regulation to this Act.

Time for Comment

- The period for comment for a proposal for a Class I instrument shall be 30 days, starting from the date

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notice of the proposal for an instrument is placed on the Environmental Registry." (Supplementary Recommendation 10)

The Task Force recommends that the classification scheme with respect to Class II and III instruments be set out in the Bill and proposes the following, approximately worded sections.

"Class II Prescribed Instruments: Criteria

- A Class II prescribed instrument or subgroup of a prescribed instrument controls activity which, in the Minister's opinion, has the following general characteristics:
 - (a) the activity requires moderate to significant mitigative measures to protect the environment;
 - (b) the geographic extent of any contamination or degradation of the environment would be of local or regional significance;
 - (c) the public interest in the activity extends beyond the local community; and
 - (d) the level of provincial government interest in the activity is moderate to high.

Additional Notice

- In addition to notice of a proposal for a Class II instrument on the Environmental Registry, the Minister shall require further notice where,
 - (a) actual contamination or degradation of the environment is occurring or is likely to occur;
 - (b) the nature, extent and duration of any actual contamination or degradation is serious;
 - (c) the area where the contamination or degradation is occurring or is likely to occur is extensive or environmentally sensitive;
 - (d) the extent and level of local or regional interest and concern in the activity controlled by the instrument is high; and
 - (e) the magnitude and probable duration of mitigative measures will have a significant local impact.

Form of Comment

- Any person may submit comment on the proposal for a Class II instrument in the manner prescribed by the regulations.

Additional Consultation

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- (1) In addition to the submission of comment under any other section, the Minister may require additional public consultation on a proposal for a Class II instrument.
- (2) The Minister may make regulations prescribing the form and extent of an additional consultation.

Time for Comment

- (1) The period for comment for a proposal for a Class II instrument shall be 30 days after the date notice of the proposal for an instrument is placed on the Environmental Registry.
- (2) The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.
- (3) The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.

The Minister may consider the following factors when determining the extent of public consultation which should be required and the appropriate means by which it should be undertaken:

- (1) Whether actual contamination or degradation of the environment is occurring or is likely to occur;
- (2) The nature, extent and duration of any actual contamination or degradation;
- (3) The area where the contamination or degradation is occurring or is likely to occur;
- (4) The extent and level of local or regional interest and concern in the activity controlled by the instrument; and
- (5) The magnitude, probable duration and potential local impact of mitigative measures.

Class III Prescribed Instruments: Criteria

- (1) A Class III prescribed instrument or subgroup of a prescribed instrument controls activity which, in the

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Minister's opinion, has the following general characteristics:

- (a) the activity requires moderate to significant mitigative measures to protect the environment;
- (b) the geographic extent of any contamination or degradation of the environment is of regional or provincial significance;
- (c) the public interest in the activity is of regional or provincial interest; or
- (d) the level of provincial government interest in the activity is high.

•(2) A prescribed instrument or a subgroup of prescribed instruments is a Class III instrument where

- (a) a prescribed Act requires a hearing before an administrative tribunal prior to the issuance of the prescribed instrument by the ministry; or
- (b) a prescribed Act permits the Minister or a ministry official to require a hearing before an administrative tribunal prior to the issuance of the prescribed instrument by the ministry, and after meeting the requirements of a Class II public consultation on the issue of whether a hearing should be required, a decision is taken to require a hearing to be held, or if the applicant at any time, consents to a hearing .

Use of Environmental Registry for Notice, Comment

- The Minister may invite written comment or require additional public consultation as provided for a Class III instrument where, in his or her opinion, consultation using the Environmental Registry is advisable and not inconsistent or duplicative of the legislative requirements or practice of the Environmental Assessment Board or other tribunal respecting public consultation. (Supplementary Recommendation 11)

Class III is designed to include those instruments which meet the general criteria set out above or those instruments for which existing legislation requires a mandatory hearing before they are issued. It would also include those instruments for which existing legislation provides a discretionary hearing and a decision has been made that a hearing should be held.

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For the Ministry of the Environment, Class III will include those instruments which require a mandatory hearing prior to issuance and those Ministry of the Environment instruments which are subject to a discretionary hearing where the Director has determined that there should in fact be a hearing (These would be the Class II instruments which are reclassified into Class III once the decision to hold a hearing is made). Additional instruments may be prescribed in the future where the instruments meet the criteria for Class III and the Minister amends the statute authorizing the issuance of the instrument to require a hearing. Where this occurs a new or amending regulation under the Bill will be required, prescribing these instruments as Class III instruments.

Class III instruments must be placed on the Environmental Registry for purposes of notice. The Minister may use the registry as a means of eliciting comment or to consult on issues which will be raised in the hearing. This is discretionary in the Minister to avoid duplication or conflict with the legislative regime creating and providing the procedure for the hearing in question. It is important to note that the Bill does not create a forum or procedure for new hearings in itself. The Bill does however provide criteria to be used by government in determining when a hearing might be appropriate (the criteria for Class III) and permits a ministry to prescribe an instrument as a Class III instrument under the Bill contemporaneous with the amendment of the legislation authorizing the issuance of the instrument. This avoids inconsistencies and duplication. For example, if the Ministry of the Environment determined that a specific group of the Environmental Protection Act section 9 air approvals should not be issued without a hearing, this section 9 subgroup could be prescribed as Class III instruments under the Bill and the Environmental Protection Act would be amended accordingly. The hearing processes under the Environmental Protection Act would then apply. This approach permits each ministry to access its own tribunal's expertise and familiar procedures.

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The Task Force noted in its Report that the public comment on an instrument that is considered should be limited to the content of the instrument itself and should not question, for example, the policy or regulation under which it was made.

The Task Force therefore recommends a provision be included in Part II of the Bill that acknowledges that the Ministry in making a decision to issue an instrument shall have regard only to comments directed to the proposal for an instrument and not to comments directed to the adequacy of the legislation, regulatory framework or policy under which the prescribed instrument is authorized. (Supplementary Recommendation 12)

The Task Force received submissions concerning section 14(3) of the Bill that financial and administrative regulations of scheduled Ministries be placed on the Registry. The Task Force wishes to clarify that the reference in Section 14(3) to predominantly financial or administrative regulations was intended to apply to routine, technical and financial regulations that would not ordinarily require public comment. No amendment is proposed with respect to this subsection.

The Task Force recommends that the notice of decisions taken in emergencies as contemplated by Section 16(1) should go to the Environmental Commissioner for his or her information in preparing annual or interim reports. The Task Force also recommends that the notice include reasons for the decision taken by the Minister. (Supplementary Recommendation 13)

The Task Force recommends that the Bill be amended to reflect that the decision of a Minister to designate a process, pursuant to section 17, as something substantially equivalent to the process of public participation contemplated by the Environmental Bill of Rights is considered a policy that would be subject to notice and comment through the Environmental Registry. (Supplementary Recommendation 14)

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Again the Task Force wishes to stress that the public participation scheme contemplated by the Task Force in the Environmental Registry is intended to be a minimum level. Where an Act prescribed in the Bill provides a lower standard, the Bill should raise the level of public participation to the Bill's standard. Where the Bill sets a standard lower than that provided for in a prescribed Act the higher standard should be used. If the process contemplated by the Bill is ever in conflict with or contradictory to the Bill then the standard of public participation should be that established by the Bill. The Task Force recommends that this principle be set out in the Bill to avoid any misunderstanding. (Supplementary Recommendation 15).

The Task Force wishes to emphasize the importance of establishing through regulations a procedure for the timely issuance of instruments (fast tracking) where the Bill's standards of public comment have been met. The importance of the use of alternative dispute resolution in resolving disputes over policy, regulations and instruments with respect to the environment is stressed by the Task Force. Consolidation of approvals must be available to applicants who wish to group applications for approvals. The streamlining of the approvals process and multi-media pilot projects in the Ministry of the Environment are supported by the Task Force for increasing certainty, uniformity and predictability in environmental decision making. Similar approaches to speeding up the issuance of instruments should be considered in other Ministries. This can be achieved without compromising protection of the environment.

The Task Force considered submissions that expressed concern about the relationship between the proposed Environmental Bill of Rights and the Environmental Assessment Act (E.A.A.) as set out in section 18. The Task Force notes as follows:

E.A.A. Policy:

- The Ministry of the Environment will be a prescribed ministry for the purposes of Section 13. This has the effect of

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requiring that the Minister consider placing E.A.A. policies or legislative changes which could have a significant effect on the environment onto the registry for purposes of public notice and comment.

E.A.A. Regulations:

- The E.A.A. would be a prescribed Act for the purposes of Section 14. This has the effect of requiring that the Minister consider placing E.A.A. regulations which could have a significant effect on the environment onto the registry for the purposes of public notice and comment;
- This also has the effect of capturing E.A.A. exemptions, which are normally done by regulation (Note: Some are apparently done by order, so the definition of regulation for the purposes of the E.B.R. should include orders made under the E.A.A.).

E.A.A. Approvals:

- Any instrument required to further an undertaking approved under the E.A.A. is exempt from the public participation requirements of the E.B.R. This should avoid duplication, double jeopardy, and possibly, inconsistent results.

E.A.A. Exemptions:

- Exemptions will be treated as regulations for the purposes of E.B.R. public participation in decision to exempt undertaking from requirements of E.A.A.;
- Once an undertaking is exempt, any instruments required to further the undertaking would be exempt from the public participation requirements of the E.B.R. (However, the exemption under the Bill only relieves the applicant from the public participation requirements of the Bill, not the need to obtain an instrument or to meet the ministry's substantive criteria for obtaining an instrument);
- Clarification of the proposed Bill could be obtained by rewording Section 18 to read as follows:
 18. (1) Section 15 does not apply where, in the Minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking approved by,
 - a) a decision made by a tribunal under an Act after affording an opportunity for public participation; or

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(b) a decision made under the Environmental Assessment Act.

(2) Section 15 does not apply where, in the Minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking which has been exempted under the Environmental Assessment Act if the exemption under that Act was the subject of a proposal for a regulation under Section 14 of this Act.

Class E.A.s:

- If an instrument is required to implement an undertaking controlled by a Class EA then, such instruments would be exempt from the public participation requirements of section 15 of the Bill (but not exempt from the requirement to obtain the instrument and to meet the substantive criteria of the issuing ministry). (Supplementary Recommendation 16)

The Task Force also recommends that the Environmental Assessment Act be a prescribed Act for the purposes of Parts IV and V of the Environmental Bill of Rights. (Supplementary Recommendation 17)

The Task Force recommends that a new provision be inserted in Part II to clarify that minor procedural defects in the use of the Environmental Registry should not invalidate instruments issued through that process. (Supplementary Recommendation 18).

In addition, the Task Force wishes to clarify that major procedural defects, for example, in the use of the Registry may lead to a need for the application to be done over again or for the decision to be subjected to judicial review pursuant to Section 74(2) of the Bill.

If the defect in the instrument is one of substance, the appeal procedures as recommended in the Report and as will be reflected in the Bill, would allow applicants and others to address the shortcomings before a tribunal.

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The Task Force recommends that the following miscellaneous provisions be incorporated in Part II of the Bill:

Appointment of Mediator and ADR

Where the Minister is of the opinion that a mediator might assist in the resolution of issues related to the proposal and the applicant or the person subject to the control document or program approval consents, the Minister may appoint a mediator. (Supplementary Recommendation 19)

This provision will apply primarily to the use of mediators to assist in resolving disputes over Class II and III instruments. Class I applicants could also use mediators in unusual cases if they consented.

The Task Force notes that it will be necessary to develop specific rules and guidelines for the delivery of mediation services and other forms of alternate dispute resolution. The regulations establishing such services should be developed in consultation with interested parties.

The Task Force recommends that the Minister have the authority to reclassify instruments from Class I to Class II if the issues in dispute merit an increased opportunity for public comment. The following approximately worded provisions are recommended for inclusion in the Bill:

"Where the Minister is of the opinion that the protection of the environment would be enhanced if a particular proposal for a Class I instrument was subject to public participation requirements prescribed for a Class II instrument, the Minister may designate that particular proposal for an instrument to be a Class II proposal."

Having made such a designation, the Minister may prescribe the requirement for public participation for each class, including:

(a) the time when notice of a proposal for an instrument may be placed on the Environmental Registry;

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- (b) the manner in which any additional notice, apart from the placement of a proposal on the Environmental Registry, may be given to the public;
- (c) the manner in which the public may make comment on the proposal for an instrument;
- (d) the manner in which the public may obtain available information about the proposal for an instrument during the period for comment;
- (e) such other standards as the Minister may provide by regulation. (Supplementary Recommendation 20)

In its report at pages 57-60, the Task Force made specific recommendations for appeals of instruments. The Task Force recommends that express sections and authority to develop regulations be included in the Bill to give effect to these recommendations. (Supplementary Recommendation 21)

In all other respects, the Task Force recommends that Part II remain as originally proposed.

Part III: The Environmental Commissioner

The Task Force considered a number of submissions urging changes to the role of the Environmental Commissioner.

The Task Force wishes to emphasize the importance of this position in fulfilling the purposes of the Environmental Bill of Rights as contemplated by the Task Force. The position should not be filled or appear to be filled in a politically partisan way. It is important that the Environmental Commissioner have a sound grasp of the field of environmental regulation. The Lieutenant Governor in Council, in appointing the Environmental Commissioner, should ensure a broad acceptance of the nominee for this position.

The Task Force recommends that the provisions which establish this position ensure the independence of the Environmental Commissioner, his or her tenure, and the method of appointment and renumeration. The Task Force considers the

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seniority of this position to be equivalent to that of the Ombudsman or Provincial Auditor. (Supplementary Recommendation 22)

The Task Force recommends that Section 23(b) be amended to clarify that it is the function of the Environmental Commissioner to provide guidance to Ministries on how to comply with the requirements of the Environmental Bill of Rights and to help ensure that Ministries develop Statements of Environmental Values. The Task Force recommends that a provision be added to Section 23 which would state that it is a function of the Environmental Commissioner to report forthwith to the Legislature on a Ministry's failure to comply with the development of an adequate Statement of Environmental Values pursuant to Sections 5, 6 and 7 of the Bill. (Supplementary Recommendation 23)

The Task Force also wishes to emphasize the role that the Environmental Commissioner should play in helping Ministries to develop consistency among their Statements of Environmental Values.

Section 23(d) (e) (f) and (g) use the word "monitor" to describe the functions of the Environmental Commissioner. The Task Force agreed with submissions that this word was too vague and, therefore, recommends its replacement with a word that would emphasize the more active role contemplated for the Environmental Commissioner. The Task Force recommends that the word "monitor" be replaced with the word "review" in the above noted paragraphs.

(Supplementary Recommendation 24)

The Task Force notes that, if the Environmental Commissioner is reviewing the use of the Registry pursuant to s.23(d), then it is expected that his or her analysis may lead to suggestions for improving the way the Registry is used. For example, the Task Force Report currently contemplates the possibility of the "upward" reclassification (e.g., Class I to Class II) of instruments within the classification system, but not a downward reclassification. It may

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be possible after some experience with the Registry and classification system to incorporate provisions for downward reclassification. It is expected that the Environmental Commissioner's review of the Registry may lead to such suggestions for improvements.

The Task Force considered a number of submissions with respect to several points in the Bill of Rights at which Ministers have discretion. The Task Force notes that the Environmental Commissioner will have the duty to review and comment upon the exercise of discretion by Ministers, particularly where the discretion is, in his or her opinion, exercised inappropriately.

The Task Force received submissions about whether the time limits in Parts IV and V were too long. The Task Force anticipates that the Environmental Commissioner's review of the receipt, handling, and disposition of Applications for Review and Applications for Investigation pursuant to section 23(f) will lead to suggestions about streamlining this process and observations about whether the time limits set out are realistic.

Part VI of the proposed Environmental Bill of Rights creates a new civil cause of action for harm to public resources and reforms the law of public nuisance. A part of the model developed by the Task Force includes defences to the new cause of action. Section 42 sets out the defences of due diligence, compliance and reasonable interpretation of instrument. The use of the cause of action and the defences will need to be watched closely. The Task Force therefore recommends that the functions of the Environmental Commission enumerated in section 23 be expanded to include a specific duty to review the use of Part VI, the civil cause of action, including use of the various defences, use of the emergency exception and the role of the Attorney General in the litigation. (Supplementary Recommendation 25)

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The Task Force was persuaded that a "biennial" report would be too infrequent to ensure political accountability. The Task Force, therefore, recommends that the Environmental Commissioner prepare annual reports to the Legislature and be empowered to make any other interim reports as the Commissioner considers necessary to deal with significant issues which may arise. The Task Force recommends that Section 24(1) be amended to refer to annual reports to the Speaker of the Assembly and that the report be laid before the Assembly forthwith upon receipt. (Supplementary Recommendation 26) Regard should be had to the analogous provision in the Provincial Audit Act, s.12.

The Task Force recommends the inclusion of a new section, analogous to Section 10 of the Provincial Audit Act, requiring the various Ministries within the Provincial Government to cooperate with the Environmental Commissioner's inquiries. (Supplementary Recommendation 27)

The Task Force also recommends that the Environmental Commissioner have subpoena powers that would enable him or her to secure necessary information from government Ministries in order to prepare his or her report. The type of subpoena powers the Task Force contemplates would be similar to a subpoena duces tecum which requires the production under oath of books, papers and other documents or things. In this regard, the Task Force considered s.14 of the provincial Audit Act which, in part, is analogous. The Task Force does not recommend that the Environmental Commission have the power of search and seizure or the powers granted to Commissioners of Inquiry under the Public Inquiries Act. (Supplementary Recommendation 28)

The Task Force recommends that the Environmental Commissioner have the power to accept special duties as may be assigned to him or her by the Legislature. In this regard, the Task Force considered Section 17 of the provincial Audit Act which is analogous. (Supplementary Recommendation 29)

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Other provisions may be necessary to empower the Environmental Commissioner's Office and the Task Force therefore recommends that whatever authority may be needed to perform the functions contemplated in Part III be given to the Environmental Commissioner. In this regard the Task Force suggests reference be had to the general provisions of the Audit Act. (Supplementary Recommendation 30)

Part IV: Application for Review

The Task Force recommends that Section 25(1) be amended to clarify that it applies only to the review of "prescribed" Acts, regulations or instruments. (Supplementary Recommendation 31)

The Task Force wishes to clarify that the Environmental Commissioner should monitor applications for technical compliance with the information sought in paragraphs 25(3)(a), (b) and (c) through the use of "user-friendly" forms.

The Task Force recommends that the word "scientific" be deleted from section 25(3)(c). (Supplementary Recommendation 32)

The Task Force recommends that Ministries develop guidelines for the assistance of the Environmental Commissioner in assessing the type of evidence that applicants could annex to Applications for Review. For example, evidence of the impact on health of an activity could be included with a Request for Review. (Supplementary Recommendation 33)

The Task Force agrees that the time frames originally proposed in the Environmental Bill of Rights should be reduced and that the Environmental Commissioner and various Ministries could respond more quickly to Applications for Review. (Supplementary Recommendation 34)

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In the case of an Application for Review that may involve more than one Ministry the Environmental Commissioner should be able to select the Ministry most appropriate to do the review.

The Task Force also recommends that Section 27 be amended to include a requirement that the Environmental Commissioner shall send notice of an Application for Review of an instrument to the holder of that instrument. The notice should include adequate information about the Application such as the basis upon which the request is being made. (Supplementary Recommendation 35)

The notice disclosing information received under section 25(3) (b) (c) would be provided to the holder of the instrument but the names, addresses and other personal information of the person requesting would be confidential.

The Task Force recommends that section 28(2) be re-worded as follows:

"The Minister shall not review a decision made in the five years preceding the date of the application if the decision was made in accordance with Part II of this Act, unless there is new social, economic, scientific or other evidence that significant harm to the environment will occur if the review is not undertaken." (Supplementary Recommendation 36)

The above change is proposed in order to make it clearer that a presumption exists for the protection of decisions made in accordance with the public participation contemplated by this bill.

The Task Force was urged by some to use a shorter period of time and by others a longer period of time than two years. Five years in the Task Force opinion strikes a fair balance between the suggested periods.

The Task Force wishes to clarify that where a regulation provides by its own terms for a periodic internal review it should not be subject to an

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Application for Review. To do otherwise could result in a duplication of effort which the Task Force seeks to avoid.

The Task Force wishes to emphasize that each Ministry's application of its own Statement of Environmental Values will be subject to scrutiny by the Environmental Commissioner pursuant to section 28(3)(a).

Concern was expressed in some submissions that "health evidence" might not be included in section 28(3)(c). The Task Force wishes to note that social, economic and scientific evidence, in its opinion, would include health evidence, as well as the long and short term effects of activities.

The Task Force recommends that s.28(3) be amended to require that where notice of a request for review of an instrument leads to a response from the holder of the instrument, it should be considered by the Ministry. (Supplementary Recommendation 37)

The Task Force recommends that the reference to written "notice" in section 29 be changed to "reasons". The reasons given should reflect the Minister's decision with respect to the public interest in Section 28(1). (Supplementary Recommendation 38)

The Task Force recommends that when a Minister has received several Applications for Review he or she should be able to prioritize the Applications and propose a plan for conducting them. This plan could be the subject of comment or review by the Environmental Commissioner.
(Supplementary Recommendation 39)

The Task Force wishes to clarify that notice of the Application for the Review need not be placed on the Registry.

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Part V: Application for Investigation

The Task Force recommends that the reference to "residents" in subsection 32(1) be changed to "persons resident". "Persons resident" would include a corporation or other legal entity. (Supplementary Recommendation 40)

The reference in section 32(2) to a form used to record the information in an Application for Investigation should, in the Task Force's opinion, be a sworn statement in a form prescribed by regulations. Where a corporation or other legal entity is the "person resident", an individual on behalf of the entity would sign the sworn statement. The Environmental Commissioner, who will receive these Applications for Investigation, will be able to monitor technical compliance with the requirements of Section 32(2).

The benefit of requiring a sworn application is that there are already consequences in the law for the making of a false statement under oath. The Task Force believes this information should be sworn because an allegation of a contravention can have serious consequences for both the person alleged to have contravened the law and for government which must devote resources to the investigation.

The Task Force wishes to clarify that in section 32(2) (b) the statement of the nature of the alleged contravention should be as detailed as possible, but need not make specific reference to Acts, or sections of Acts or regulations. The Environmental Commissioner would forward the material to the most appropriate Ministry or Ministries.

The Task Force agrees that the time frames originally proposed in the Environmental Bill of Rights should be reduced and that the Environmental Commissioner and various Ministries could respond more quickly to Applications for Investigations. (Supplementary Recommendation 41)

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The Task Force recommends that section 35 be amended to clarify that a Minister can decline to investigate where to do so would duplicate an investigation of an alleged incident that has already been or started or completed. (Supplementary Recommendation 42)

The Task Force recommends that the introductory words of section 35 be amended to state that "...the Minister shall investigate all matters to the extent necessary in relation to a contravention alleged in an Application for Investigation. The original wording suggested that the Minister could exercise his or her discretion only with respect to whether an investigation would be done at all rather than as to the extent of the investigation. It would still be open to the Minister to decline an investigation if the criteria set out in Section 35(a), (b), (c) or (d) apply. (Supplementary Recommendation 43)

With respect to Section 36 the Task Force recommends that the Minister give written notice of the decision not to investigate and in the notice set out the reasons for refusing to undertake the investigation by referencing back to the criteria in Section 35(a) (b) (c) and (d). (Supplementary Recommendation 44)

The Task Force wishes to clarify that the "outcome of the investigation" referred to in section 38 could include the laying of charges and/or administrative action, such as a control order by the Ministry of the Environment.

The Task Force wishes to note that nothing in this part of the Bill should be interpreted as interfering with the role of the Attorney General, his/her agents or counsel in ensuring the proper administration of justice or in exercising prosecutorial discretion.

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Part VI: Civil Cause of Action and Public Nuisance

The Task Force considered suggestions that "harm" be more specifically defined in section 39. Given that this is a new civil cause of action related to public resources, the Task Force concluded that it would be preferable to have the term "harm" judicially interpreted in specific fact situations as opposed to trying to define legislatively what harm is in a factual vacuum. The definition in the Task Force's opinion is adequate to allow this interpretation to occur.

With respect to the definition of "public land" in Section 39, the Task Force wishes to clarify that in its interpretation the definition currently would include provincial parks and wildlife preserves but not necessarily Crown lands which have been leased for private use. The Task Force suggests that the government consider further the question of the application of these provisions to lands leased from the Crown.

The Task Force received comments on the five hectare limits in Section 39(d) and considered larger and smaller parcels of public land for the purposes of this definition. However, on balance, the five hectare limits seemed reasonable and the Task Force does not recommend any change to this definition.

The phased in implementation of the Environmental Bill of Rights will need to take into consideration the relationship between sections 40 and 41. A contravention or alleged contravention of prescribed Acts may lead to the commencement of a proceeding under Section 41. Over time, Section 41 will, therefore, apply to an increasing number of prescribed Acts. It is the Task Force's intention that Section 41 apply to contraventions or alleged contraventions of Acts as they are prescribed.

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The Task Force recommends that the expression "bring an action" in section 41 be amended to say "commence and maintain an action" and that the words "and is entitled to judgment" be followed by the words "if successful". "Resident" should be changed to "person resident". As a result, the sub-section would now read:

"Where a person has contravened or will imminently contravene a prescribed Act, regulation or instrument and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may commence and maintain an action against the person in the Court in respect of the harm and is entitled to judgment if successful." (Supplementary Recommendation 45)

The Task Force notes a typographical error in section 41(5). The reference to subsection 2 should be subsection 1. In addition, the Task Force recommends that the words "except as may be prescribed as a result of a federal/provincial agreement" be added to the end of subsection 5 so that it would now read as follows:

"Subsection 1 does not apply in relation to a contravention of an Act of Canada or a regulation or instrument under an Act of Canada except as may be prescribed as a result of a federal/provincial agreement". (Supplementary Recommendation 46)

The Task Force recommends that an amendment be made to the Bill clarifying that it was not its intention that section 41(7) should in any way eliminate, or affect in any way, the right to prosecute, in a criminal context, an alleged contravention of an environmental Act or a regulation. Public and private prosecutions of environmental offenses should continue to be available even if a Section 41 action has been commenced or finally determined in the civil courts. It is the Task Force's opinion that this section does not and should not have the affect of preventing prosecutions. (Supplementary Recommendation 47)

While no consensus emerged with respect to changing or deleting section 42(3), the Task Force wishes to clarify that the purpose of this subsection is to

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recognize the fact that instruments, unlike Acts and regulations, are often drafted, not by lawyers but by engineers and scientists, with primary emphasis on technical content. Industries may rely on their interpretation of this language for many years, designing processes in conformity with that interpretation. The Ministry creating the instrument may even share that interpretation. The wording of the instrument may permit more than one reasonable interpretation, yet a Court may feel that despite the ambiguities in drafting, a particular interpretation other than the one relied upon by the Defendant is the better one. In these circumstances, if the interpretation relied upon by the Defendant is, in the opinion of the Court, a reasonable one, it should be a defence. This should not in any way be interpreted as sanctioning a mistake of law or ignorance of the law as a defence to the civil cause of action for harm to a public resource.

The Task Force considered a number of submissions related to the role of the Attorney General in this civil cause of action. The Task Force wishes to clarify that it understands that in many of these suits, the Crown will be a defendant with all the rights and obligations of a party to the action.

In other cases, however, the Crown may not be a Defendant. In such situations, the Task Force is of the opinion that the Crown should be given notice of the action through the Attorney General's Office and that the Crown should then make a decision about its intended role in the litigation. The Crown may wish to join with the Plaintiff if it agrees with the allegations. The Crown may wish to join with the Defendant if it believes the claim is unnecessary or inappropriate or in any other cases, the Crown may wish to act simply as an intervenor. The Task Force anticipates the Attorney General being involved in each case in some way unless the other parties agree that his or her participation is unnecessary. (See for example s.9(4) of the Judicial Review Procedure Act). The Task Force recommends that the Court have this flexibility to ensure the maximum participation of necessary parties for

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the proper adjudication of these claims, including the development of appropriate restoration plans. (Supplementary Recommendation 48)

The Task Force recommends that subsection 46(1) be redrafted to state as follows:

"s.46 (1) The Court may permit any person to participate in the action to provide fair and adequate representation of the private and public interests at stake.

(2) The Court may make any order it considers appropriate setting out the rights, including appeal rights, if any, of the persons with respect to participation in the action and Restoration Plan.

(3) No order shall be made under subsection (1) after the court has made an order under section 49.

(4) The Rules of Civil Procedure apply to actions commenced under section 41."
(Supplementary Recommendation 49)

The Court must establish as early in the litigation as possible the necessary parties and their roles to facilitate resolution of the liability issues.

The Task Force wishes to clarify that section 49 provides that only parties to the action may negotiate the Restoration Plan. Concerns were expressed that negotiations should not become disrupted by persons who, while interested, had no direct stake in the outcome. The Court should control who participates and upon what terms.

The Task Force recommends that the wording of section 49(2) be reconsidered to ensure that it is clear that no award of damages is available in this cause of action. A restoration plan can contemplate a monetary payment provided the conditions set out in Section 51(7) are satisfied. Section 49(2) should be amended to delete the reference to (d) and refer only to subsection (1).
(Supplementary Recommendation 50)

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The Task Force recommends that the reference to Section 2 of the Farm Practices Protection Act in section 49(3) be deleted and that the subsection read as follows:

"No order shall be made under this section that is inconsistent with the Farm Practices Protection Act". (Supplementary Recommendation 51)

The Task Force considered submissions from the agricultural community about the effectiveness of the Farm Practices Protection Act. In particular, the agricultural community requested that the protection available under this Act be expanded to cover a wider range of normal farming practices. The Task Force is unable to make specific recommendations with respect to this proposal as it would go beyond its terms of reference, but acknowledges the significance of the Farm Practices Protection Act to the agricultural community in Ontario. The change proposed with respect to Section 49(3) is to clarify the Task Force's understanding that the civil cause of action for harm to public resources should not disturb protections currently available under the Farm Practices Protection Act or protections that may be available in the future.

The Task Force considered submissions concerning section 51 stating that the Courts in Ontario do not have sufficient judicial expertise or resources to design such potentially complicated plans. The Task Force does not anticipate a flood of litigation pursuant to this provision and does not consider the design of a restoration plan to be any more difficult or complicated than many of the other problems currently resolved by the sophisticated judiciary in this Province. If experience indicates there is a need for judicial education in the area of environmental law, then the Task Force recommends that such judicial education be provided. (Supplementary Recommendation 52)

The Task Force recommends that in section 51(2) the word "should" be changed to "shall" in the second line. (Supplementary Recommendation 53)

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A suggestion for alternatives to the use of the words "reasonable" and "practical" were discussed by Task Force members but no consensus emerged for a change to the existing wording.

The Task Force wishes to clarify its intention that the Courts have available maximum flexibility in gathering together assistance for the design of a restoration plan. It should not be necessary in every case for the Judge to do the detailed designing of the restoration of a public resource.

Section 54 contemplates the Court drawing upon one or more types of resources to assist in the design of the plan. For example, Section 54(1)(c) contemplates the appointment of a consultant for the development of a restoration plan. The court could also refer the design to others who have sufficient expertise. These alternatives would be used subject to the sharing of costs among the appropriate parties.

The Task Force wishes to clarify that the normal rules for the enforcement of a judgment, including contempt, would apply for the enforcement of a restoration plan ordered by the Court pursuant to section 54(3).

The Task Force notes that because intervenor funding under the Intervenor Funding Pilot Project Act is intended to fund intervenors against proponents before certain administrative tribunals such as the Ontario Energy Board and the Ontario Municipal Board, it is unavailable for commencing and maintaining a civil cause of action. The Ontario Legal Aid Plan does consider applications for Legal Aid Certificates in representative actions, group claims or test cases. The normal rules with respect to Legal Aid would apply.

The Task Force recommends that section 58 be amended to clarify that the Attorney General's consent will no longer be required for commencing and maintaining an action in public nuisance for harm to the environment that

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leads to direct economic loss or direct personal injury. (Supplementary Recommendation 54)

With respect to the cause of action generally, the Task Force wishes to note that the experience in Michigan with a broader cause of action reveals that the floodgates of litigation, so to speak, are not opened by permitting such disputes to be considered by the court.

The Task Force also recommends that Part VI of the Environmental Bill of Rights be amended to include a provision requiring court approval of any discontinuance, abandonment or other settlement of a Section 41 claim. In this regard, the Task Force recommends that a provision similar to Section 29 of the Class Proceedings Act be considered. (Supplementary Recommendation 55)

The Task Force notes the relationship between the new civil cause of action and the recently introduced Limitations Act reform. The Task Force's recommendations with respect to limitation periods (see Report Recommendations 89 and 90 and the discussion at pp. 106 - 107) must be incorporated in that reform.

Part VII: Whistle Blower Protection

The Task Force does not recommend any changes to this part of the proposed Environmental Bill of Rights.

However, it should be clarified that the existing whistle blower protection provisions of the Environmental Protection Act will need to be repealed and such repeal should be referenced at the time the Environmental Bill of Rights is proclaimed.

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Part VIII: General/Transitional

It is not intended that a Minister attempt to distance himself or herself from environmental decision-making by delegating the responsibility. It is an underlying principle of the Environmental Bill of Rights that Ministers themselves accept ministerial responsibility for environmental decision-making. This accountability should not to be delegated to civil servants.

However, the Task Force wishes to make it clear in section 73 its intention that a Minister must have the ability to authorize individuals within government to assist him or her in the exercise of duties which may arise under the Environmental Bill of Rights. For example, the Minister of the Environment may wish to authorize directors to undertake certain steps on his or her behalf, but the Minister remains responsible for the result.

The Task Force recommends that a provision equivalent to section 189 of the Environmental Protection Act be considered for inclusion in the Bill. This would provide certain Crown employees with protection from lawsuits in connection with their day to day duties. (Supplementary Recommendation 56)

The Task Force recommends that the words "questioned or" be removed from subsection 74(1) so that it will now read:

"Except as provided in Section 41 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a Minister under this Act shall be reviewed in any court". (Supplementary Recommendation 57)

The Task Force recognizes that new sections will be added to Part II of the Bill as proposed and that the references in section 74 should be reviewed carefully to ensure the proper availability of judicial review.

The Task Force recommends that in subsection 74(2) the availability of judicial review in Part II be clarified as follows:

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"Any person resident in Ontario may make an application for judicial review under the Judicial Review Procedure Act on the grounds that a Minister failed to comply with the requirements of Sections 4, 15 or 16 respecting a proposal for an instrument". (Supplementary Recommendation 58)

The Task Force recommends that the 15 day time limit be increased to 21 days in subsection 74(3). (Supplementary Recommendation 59)

The Task Force wishes to clarify that it is not intended that federal acts, statutory provisions, regulations or instruments be prescribed under the Ontario Environmental Bill of Rights pursuant to subsection 76(3), except where there is a federal/provincial agreement for provincial, administration and enforcement of the federal provision. A current example of this type of arrangement is the provincial enforcement of the Fisheries Act.

With respect to the anticipated phase-in of the Bill of Rights, the Task Force initially focused on the application of the Bill to the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Northern Development Mines and the Ministry of Agriculture and Food and then such other Ministries as Cabinet may decide over time. The Task Force intended that a reasoned and organized "phase in" of essential Ministries be accomplished. Suggestions were made during the period of public comment that several other Ministries which make significant environmental decisions also be expressly named, including the Ministry of Energy, the Ministry of Transportation, the Ministry of Consumer and Commercial Affairs, Ministry of Industry Trade and Technology, Ministry of Government Services, Ministry of Education and Ministry of Treasury and Economics. The Task Force as a result of its ongoing discussions with government understands that application of the Environmental Bill of Rights beyond the key Ministries identified in the report is expected. Subject to the considerations set out in Chapter 5 of its earlier Report, an accelerated phase in of Ministries making key environmental decisions is supported by the Task Force. However, the precise timetable and sequence of

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Ministries being prescribed should be left in the hands of Cabinet to decide with regard to a practical phase in that is realistic and permits government to benefit from the experiences of Ministries as they join.

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CHAPTER 3: CONCLUSIONS AND NEXT STEPS

The Task Force's recommendations in this Supplementary Report are made to the Honourable Ruth Grier, Minister of the Environment, to assist her in coming forward with an Environmental Bill of Rights for First Reading in the Spring of 1993 that meets the interests and needs of those who will make use of the Environmental Bill of Rights and be affected by it.

The Task Force understands that the Minister of the Environment will now review and take forward the Task Force's original Report and these Supplementary Recommendations to Cabinet for approval to draft an Environmental Bill of Rights for introduction in the Spring session of the Legislature in 1993. A period of confidentiality must necessarily accompany the Minister's submission to Cabinet. However, the Task Force accepts the Minister's invitation to the Task Force to review, on a confidential basis, the draft Environmental Bill of Rights prior to introduction in 1993.

Assuming that the proposed Bill reflects the consensus reached by the Task Force, its members will join the Minister in her announcement of the introduction and in supporting her legislative efforts through to Proclamation.

The proposed Environmental Bill of Rights relies heavily upon a framework that will be comprised of detailed regulations that implement numerous aspects of the Bill. While the Task Force members cannot as a part of their consensus, sign off on behalf of their various constituencies with respect to the proposed draft regulation, they do accept the Minister's offer to consult with Task Force members on a confidential basis as the regulation is prepared.

The Task Force members wish to underline the importance of public comment on all aspects of their work and urge the Minister to ensure the fullest

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opportunity for public input and comment on the proposed regulation. This is particularly so with respect to those aspects of the regulation which establish the classification scheme for environmentally significant policies, regulations and instruments and the proposed application of the proposed Environmental Bill of Rights to several provincial Ministries.

The Task Force members wish to acknowledge the value of the process by which this consensus was achieved. The establishment of the Task Force and resources devoted to it provided diverse interests with an opportunity to learn about the needs of others in the community who are interested in and affected by environmental decision-making. This opportunity to learn has generated a great deal of goodwill among those who may have traditionally considered themselves adversaries when it came to environmental protection. The Environmental Bill of Rights, when enacted, will deliver similar opportunities to learn about the needs of the public at large when significant environmental decisions are made. If this goal is achieved, the Task Force members will consider their work to have been worthwhile.

APPENDIX A: NEWS RELEASE, MINISTRY OF THE ENVIRONMENT, JULY 8, 1992.

July 8, 1992

FOR FURTHER INFORMATION:

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**ENVIRONMENT MINISTER RUTH GRIER RELEASES
DRAFT ENVIRONMENTAL BILL OF RIGHTS**

Environment Minister Ruth Grier today released a draft Environmental Bill of Rights for public review.

The draft bill is included in the Report of the Task Force on the Ontario Environmental Bill of Rights.

"The task force did what the critics said could never be done: It drafted a bill reflecting a consensus of business and environmental groups," Mrs. Grier said. "With this unanimous agreement, we are moving forward with the support of both communities.

"When governments fail to meet their obligation to safeguard the environment, citizens should be able to hold them accountable," she said. "The proposed Environmental Bill of Rights is a unique piece of legislation that gives people unprecedented new powers to protect the environment."

The Environmental Bill of Rights will create a win-win situation for everyone. It will open up the government's environmental decision-making process to much greater public

scrutiny. This will give business a uniform and predictable process for obtaining environmental approvals, while giving citizens an opportunity to influence decisions at an earlier stage.

Highlights of the draft bill include:

- appointment of an independent Environmental Commissioner to make sure the principles of the bill are applied in a fair and consistent manner;
- the creation of an accessible registry to give the public necessary information, including advance notice of significant environmental decisions to be made, information on how to participate and notice of final decisions;
- provisions for requesting formal reviews of decisions;
- provisions for requesting that the government formally review the need for a new environmental policy, law or legal instrument;
- provisions for initiating investigations of alleged incidents of environmental harm;
- enhanced access to courts by the creation of a new civil cause of action and by the removal of standing as a barrier in public nuisance actions;
- extended whistle-blower protection for employees who report environmental wrongdoing on the part of their employers.
- a requirement that formal Statements of Environmental Values be prepared by all ministries which make decisions with environmental consequences.

The task force is chaired by Michael Cochrane, formerly with the Ministry of the Attorney General and now in private practice, and Deputy Minister of the Environment Richard Dicerni. Previous Deputy Minister of the Environment Gary Posen served as co-chair between October 1991 and May 1992.

The other members are:

- Bob Anderson of the Business Council on National Issues
- George Howse of the Canadian Manufacturers' Association
- Rick Lindgren from the Canadian Environmental Law Association
- John Macnamara of the Ontario Chamber of Commerce
- Paul Muldoon from Pollution Probe
- Andrew Roman, a lawyer specializing in administrative and environmental law
- Sally Marin from the Ministry of the Environment

"These individuals have proven that, if people are brought together in a co-operative spirit with a clear mandate, they can develop solutions which have integrity and meet the needs of everyone involved," Mrs. Grier said.

"For too long, the public has remained on the outside looking in. They have been denied their right to a say in decisions which dramatically affect their lives," she said.

"The Environmental Bill of Rights will open doors that were previously closed to people. We are bringing Ontario closer to true environmental democracy."

Information materials, including copies of the Report of the Task Force on the Environmental Bill of Rights and the proposed bill, are available by calling the Ministry of the Environment's toll-free number: 1-800-565-4860. Requests may also be sent by fax to (416) 323-4564.

Written comments can be submitted until Oct. 16, 1992 to Environmental Bill of Rights, Attention: Ruth Grier, Minister of the Environment, 135 St. Clair Ave. W., Toronto, Ontario, M4V 1P5.

APPENDIX B:

LIST OF GROUPS THAT PROVIDED COMMENTS.

APPENDIX B

SUBMISSIONS REGARDING EBR

Submissions by Environmentalists:

1. South Lake Simcoe Naturalist Club
2. Protect Our Water and Environmental Resources
3. Pesticide Action League
4. Kingston Environmental Action Project
5. Canadian Parks and Wilderness Society (Ottawa-Hull Chapter)
6. Pickering Rural Association
7. Sierra Club of Eastern Canada
8. Toronto Environmental Advisory Network of Waterloo
9. Ottawa Peace and Environment Resource Center
10. The Environmental Advisory Network of Waterloo
11. Environmental Youth Alliance
12. Eco-Council of the Peterborough Area
13. Environmental Youth Corps-County of Haliburton
14. Environmental Task Force Toronto Conference, United Church of Canada
15. Allergy and Environmental Health Association of Canada
16. Conservation Council of Ontario
17. Resources and Environmental Group, University Women's Club of North York
18. Canadian Institute for Environmental Law and Policy
19. The Federation of Ontario Cottagers' Associations Incorporated
20. Citizens Environment Alliance
21. The Society for Environmental Medicine
22. Environmental Law Society, Faculty of Law, University of Windsor
23. Paudash Lake Conservation Association
24. Ontario Environmental Network

Submissions by Business and Business Associations:

1. Ontario Dairy Council
2. Ontario Restaurant Association
3. Insurance Bureau of Canada
4. Canadian Council of Grocery Distributors
5. The Canadian Chemical Producers' Association-CCPA
6. The Ontario Chamber of Commerce
7. Polysar Rubber Corporation
8. Canadian Meat Council
9. Advisory Committee on Environmental Standards
10. The Hostess Frito-Lay Company
11. Ontario Natural Gas Association
12. American Water Works Association - Ontario Section
13. Council of Ontario Construction Associations
14. Bell Ontario

15. The Metropolitan Toronto Board of Trade
16. Ontario Home Builders' Association
17. Association of Professional Engineers of Ontario
18. Dow Canada
19. Moore Partners Limited
20. Urban Development Institute

Submissions by Resource Industries:

1. Falconbridge Limited
2. Porcupine Prospectors and Developers Association
3. Ontario Forest Industries Association
4. Noranda Inc.
5. Ontario Mining Association

Submissions by the Agricultural Community:

1. Ontario Farm Environmental Coalition
2. National Farmers' Union
3. Ontario Federation of Agriculture
4. Ontario Cattlemen's Association
5. Ontario Pork Producers' Marketing Board
6. The Ontario Wheat Producers' Marketing Board
7. Lanark County Federation of Agriculture
8. The Fertilizer Institute of Ontario Inc.
9. The Ontario Milk Marketing Board

Submissions by Labour

1. CAW-TCA
2. Ontario Federation of Labour
3. Oxford Regional Labour Council
4. Labour Council of Metropolitan and York Region

Submissions by Other Governments and Government Agencies:

1. Ontario Hydro
2. Ministry of Environment and Public Safety for the Government of Saskatchewan
3. Saugeen Valley Conservation Authority
4. Farm Practices Protection Board
5. Nottawasaga Valley Conservation Authority
6. Central Lake Ontario Conservation Authority

Submissions by Towns and Municipalities:

1. Corporation of the Township of Norfolk
2. The Town of Richmond Hill
3. Corporation of the City of Thorold
4. Town of Exeter
5. City of Windsor
6. United Counties Stormont, Dundas and Glengarry - Committee on Agriculture, Reforestation and Planning
7. The Corporation of the Town of Markham
8. United Counties Stormont, Dundas and Glengarry - Waste Management Master Plan
9. Association of Municipalities of Ontario
10. City of Ottawa
11. City of Niagara Falls Canada
12. County of Peterborough
13. Township of West Carleton
14. The Corporation of the Town of Caledon

Submissions by Other Ministries:

1. Ministry of Agriculture and Food
2. Ministry of Natural Resources
3. Ministry of Culture and Communications
4. Ministry of Transportation
5. Ministry of the Attorney General
6. Ministry of Municipal Affairs
7. Ministry of Labour
8. Ministry of Northern Development and Mines
9. Ministry of Energy
10. Ministry of Treasury and Economics
11. Ministry of Industry, Trade and Technology

Submissions by the Legal Community:

1. Canadian Bar Association - Ontario
2. Osler, Hoskin & Harcourt Barristers and Solicitors
3. The Advocates' Society

APPENDIX C: SUMMARY OF SUPPLEMENTARY RECOMMENDATIONS

Supplementary Recommendation 1:

The Task Force recommends that the preamble be redrafted to reflect the following concepts:

- "The people of Ontario recognize the inherent value of the natural environment.
- The people of Ontario have the right to a healthful environment.
- The people of Ontario have as a common goal the preservation, protection and remediation of the natural environment for the benefit of present and future generations.
- While the government has the primary responsibility for achieving this goal, the people should have the means to ensure that it is achieved in an effective, timely, open and fair manner."

Supplementary Recommendation 2:

The Task Force recommends changing the definition of "instrument" in Section 1 so that the word "prescribed" is inserted before the word "Act" in the first line of the definition.

Supplementary Recommendation 3:

The Task Force was urged to replace the proposed definition of "wetland" in section 1 with a definition from the policy guidelines of the Ministry of Natural Resources. The Task Force, therefore, recommends that "wetland" be amended to exclude lands being used for agricultural purposes, that are periodically "soaked" or "wet".

Supplementary Recommendation 4:

The Task Force recommends that the words "for the benefit of present and future generations" in section 2(1)(b)(c) be deleted.

Supplementary Recommendation 5:

The Task Force also recommends that section 2(1)(c) be amended to state that "The purposes of this Act are ... (c) to set out the means by which the people of Ontario may act to protect their right to a healthful environment as provided in this Act".

Supplementary Recommendation 6:

The Task Force recommends that sections 5, 6, and 7 be amended to impose time limits on Ministries in the preparation of Statements of Environmental Value. The following amendments, worded approximately, are recommended:

- Within three months after the date upon which this Part applies to a Ministry, the Minister shall develop a Ministry statement of environmental values that, ...
 - (1) Within the time referred to in section 5, the Minister shall give notice to the public that he or she is developing the Ministry statement of environmental values.
 - (2) The notice shall include any information that the Minister considers appropriate and shall invite comments from members of the public on what should be in the statement.
 - (3) The period for comment shall be no less than 30 days.
 - (4) The Minister may extend the period for comment where, in his or her opinion, a longer period for comment is necessary having regard to,
 - (a) the complexity of the proposed statement of environmental values;
 - (b) the level of public interest in the statement of environmental values;
 - (c) the period of time the public may require to make informed comment; or
 - (d) other factors the Minister may consider relevant.
- (1) Within three months after notice of intent to develop a Statement of Environmental Values is given under section 6, the Minister shall give notice of the statement to the public.
 - (2) The notice shall include a brief explanation of the effect, if any, of comments from members of the public on the development of the statement and any other information that the Minister considers appropriate."

Supplementary Recommendation 7:

The Task Force recommends that the word "considered" in the first line of section 5(a) be changed to "applied", so that it would now read, " ... (a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the Ministry ... ".

Supplementary Recommendation 8:

The Task Force recommends that the words "consideration of" be deleted from the first line of section 5(b).

Supplementary Recommendation 9:

The Task Force recommends that the minimum requirements for policies, acts and regulations on the Registry be set out expressly in the Bill and suggests the following amendments be added to Part II:

"Policies, Acts

- The period for comment on a proposal for a policy or Act shall be no less than 30 days.
- The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.
- The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.

Regulations

- The period for comment on a proposal for a regulation shall be no less than 30 days.
- The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.
- The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.
- The Minister may require the preparation of a Regulatory Impact Statement where in his or her opinion, the statement is necessary to permit meaningful public consultation on the proposal.
- A Regulatory Impact Statement shall include,
(a) a brief statement of the objectives of the proposed regulation;
(b) a preliminary assessment of the environmental and economic impacts of the proposed regulation; and
(c) the reasons why regulation is the preferred means to achieve the desired environmental objective."

Supplementary Recommendation 10:

The Task Force recommends that the classification scheme for instruments be incorporated in the Bill and proposes sections, approximately worded, for consideration:

"INSTRUMENTS

Proposal for Regulation for Prescribing Instruments

- The Minister, with the consent of the Lieutenant Governor in Council, may make a regulation prescribing significant environmental instruments issued or made under

prescribed Acts and assigning each prescribed instrument or subgroup of prescribed instruments to a class for purposes of public participation.

Prescribed Instruments: Criteria

- In forming an opinion as to whether an instrument is a significant environmental instrument which should be prescribed under the Act, the Minister may consider the following:
 - (a) the potential for the activity controlled by the instrument to contaminate or degrade the environment;
 - (b) the probable geographic extent of any significant adverse environmental impact;
 - (c) the potential public interest in the activity controlled by the instrument under consideration;
 - (d) the level of provincial government interest in the activity to be controlled by the instrument under consideration; and
 - (e) any other factor the Minister deems relevant.

Classification of Prescribed Instruments

- Prescribed instruments or a subgroup of prescribed instruments shall be classified into one of Class I, Class II or Class III for the purposes of public participation requirements.

Class I Prescribed Instruments: Criteria

- A Class I prescribed significant instrument or subgroup of prescribed instruments controls activity which, in the Minister's opinion, has the following general characteristics:
 - (a) the risk of contamination or degradation by the activity is limited because preventative and mitigative measures are routine and effective;
 - (b) the geographic extent of any contamination or degradation of the environment would be of local significance;
 - (c) there is little public interest in the activity beyond the local community; and
 - (d) the level of provincial government interest in the activity is low to moderate.

Form of Comment

- Any person may submit comment on the proposal for a Class I instrument in the manner prescribed by regulation to this Act.

Time for Comment

- The period for comment for a proposal for a Class I instrument shall be 30 days, starting from the date notice of the proposal for an instrument is placed on the Environmental Registry."

Supplementary Recommendation 11:

The Task Force recommends that the classification scheme with respect to Class II and III instruments be set out in the Bill and proposes the following, approximately worded, sections.

"Class II Prescribed Instruments: Criteria

• A Class II prescribed instrument or subgroup of a prescribed instrument controls activity which, in the Minister's opinion, has the following general characteristics:

- (a) the activity requires moderate to significant mitigative measures to protect the environment;
- (b) the geographic extent of any contamination or degradation of the environment would be of local or regional significance;
- (c) the public interest in the activity extends beyond the local community; and
- (d) the level of provincial government interest in the activity is moderate to high.

Additional Notice

- In addition to notice of a proposal for a Class II instrument on the Environmental Registry, the Minister shall require further notice where,
 - (a) actual contamination or degradation of the environment is occurring or is likely to occur;
 - (b) the nature, extent and duration of any actual contamination or degradation is serious;
 - (c) the area where the contamination or degradation is occurring or is likely to occur is extensive or environmentally sensitive;
 - (d) the extent and level of local or regional interest and concern in the activity controlled by the instrument is high; and
 - (e) the magnitude and probable duration of mitigative measures will have a significant local impact.

Form of Comment

- Any person may submit comment on the proposal for a Class II instrument in the manner prescribed by the regulations.

Additional Consultation

- (1) In addition to the submission of comment under any other section, the Minister may require additional public consultation on a proposal for a Class II instrument.
- (2) The Minister may make regulations prescribing the form and extent of an additional consultation.

Time for Comment

- (1) The period for comment for a proposal for a Class II instrument shall be 30 days after the date notice of the proposal for an instrument is placed on the Environmental Registry.
- (2) The Minister may provide for a period of comment in excess of 30 days where in his or her opinion a longer period is necessary to permit meaningful public consultation on the proposal.
- (3) The Minister may extend the period for comment at any time prior to the expiry of the designated period and notice of any such extension shall be placed on the Environmental Registry forthwith.

The Minister may consider the following factors when determining the extent of public consultation which should be required and the appropriate means by which it should be undertaken:

- (1) Whether actual contamination or degradation of the environment is occurring or is likely to occur;
- (2) The nature, extent and duration of any actual contamination or degradation;
- (3) The area where the contamination or degradation is occurring or is likely to occur;
- (4) The extent and level of local or regional interest and concern in the activity controlled by the instrument; and
- (5) The magnitude, probable duration and potential local impact of mitigative measures.

Class III Prescribed Instruments: Criteria

- (1) A Class III prescribed instrument or subgroup of a prescribed instrument controls activity which, in the Minister's opinion, has the following general characteristics:
 - (a) the activity requires moderate to significant mitigative measures to protect the environment;
 - (b) the geographic extent of any contamination or degradation of the environment is of regional or provincial significance;
 - (c) the public interest in the activity is of regional or provincial interest; or
 - (d) the level of provincial government interest in the activity is high.

- (2) A prescribed instrument or a subgroup of prescribed instruments is a Class III instrument where
 - (a) a prescribed Act requires a hearing before an administrative tribunal prior to the issuance of the prescribed instrument by the ministry; or
 - (b) a prescribed Act permits the Minister or a ministry official to require a hearing before an administrative tribunal prior to the issuance of the prescribed instrument by the ministry, and after meeting the requirements of a Class II public consultation on the issue of whether a hearing should be required, a decision is taken to require a hearing to be held, or if the applicant at any time, consents to a hearing .

Use of Environmental Registry for Notice, Comment

- The Minister may invite written comment or require additional public consultation as provided for a Class III instrument where, in his or her opinion, consultation using the Environmental Registry is advisable and not inconsistent or duplicative of the legislative requirements or practice of the Environmental Assessment Board or other tribunal respecting public consultation."

Supplementary Recommendation 12:

The Task Force noted in its Report that the public comment on an instrument that is considered should be limited to the content of the instrument itself and should not question, for example, the policy or regulation under which it was made.

The Task Force therefore recommends a provision be included in Part II of the Bill that acknowledges that the Ministry in making a decision to issue an instrument shall have regard only to comments directed to the proposal for an instrument and not to comments directed to the adequacy of the legislation, regulatory framework or policy under which the prescribed instrument is authorized.

Supplementary Recommendation 13:

The Task Force recommends that the notice of decisions taken in emergencies as contemplated by Section 16(1) should go to the Environmental Commissioner for his or her information in preparing annual or interim reports. The Task Force also recommends that the notice include reasons for the decision taken by the Minister.

Supplementary Recommendation 14:

The Task Force recommends that the Bill be amended to reflect that the decision of a Minister to designate a process, pursuant to section 17, as something substantially equivalent to the process of public participation contemplated by the Environmental Bill of Rights is considered a policy that would be subject to notice and comment through the Environmental Registry.

Supplementary Recommendation 15:

Again the Task Force wishes to stress that the public participation scheme contemplated by the Task Force in the Environmental Registry is intended to be

a minimum level. Where an Act prescribed in the Bill provides a lower standard, the Bill should raise the level of public participation to the Bill's standard. Where the Bill sets a standard lower than that provided for in a prescribed Act the higher standard should be used. If the process contemplated by the Bill is ever in conflict with or contradictory to the Bill then the standard of public participation should be that established by the Bill. The Task Force recommends that this principle be set out in the Bill to avoid any misunderstanding.

Supplementary Recommendation 16:

The Task Force considered submissions that expressed concern about the relationship between the proposed Environmental Bill of Rights and the Environmental Assessment Act (E.A.A.) as set out in section 18. The Task Force notes as follows:

E.A.A. Policy:

- The Ministry of the Environment will be a prescribed ministry for the purposes of Section 13. This has the effect of requiring that the Minister consider placing E.A.A. policies or legislative changes which could have a significant effect on the environment onto the registry for purposes of public notice and comment.

E.A.A. Regulations:

- The E.A.A. would be a prescribed Act for the purposes of Section 14. This has the effect of requiring that the Minister consider placing E.A.A. regulations which could have a significant effect on the environment onto the registry for the purposes of public notice and comment;
- This also has the effect of capturing E.A.A. exemptions, which are normally done by regulation (Note: Some are apparently done by order, so the definition of regulation for the purposes of the E.B.R. should include orders made under the E.A.A.).

E.A.A. Approvals:

- Any instrument required to further an undertaking approved under the E.A.A. is exempt from the public participation requirements of the E.B.R. This should avoid duplication, double jeopardy, and possibly, inconsistent results.

E.A.A. Exemptions:

- Exemptions will be treated as regulations for the purposes of E.B.R. public participation in decision to exempt undertaking from requirements of E.A.A.;
- Once an undertaking is exempt, any instruments required to further the undertaking would be exempt from the public participation requirements of the E.B.R. (However, the exemption under the Bill only relieves the applicant from the public participation requirements of the Bill, not the need to obtain

- an instrument or to meet the ministry's substantive criteria for obtaining an instrument);
- Clarification of the proposed Bill could be obtained by rewording Section 18 to read as follows:
 18. (1) Section 15 does not apply where, in the Minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking approved by,
 - a decision made by a tribunal under an Act after affording an opportunity for public participation; or
 - (b) a decision made under the Environmental Assessment Act.
 - (2) Section 15 does not apply where, in the Minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking which has been exempted under the Environmental Assessment Act if the exemption under that Act was the subject of a proposal for a regulation under Section 14 of this Act.

Class E.A.S:

- If an instrument is required to implement an undertaking controlled by a Class EA then, such instruments would be exempt from the public participation requirements of section 15 of the Bill (but not exempt from the requirement to obtain the instrument and to meet the substantive criteria of the issuing ministry).

Supplementary Recommendation 17:

The Task Force also recommends that the Environmental Assessment Act be a prescribed Act for the purposes of Parts IV and V of the Environmental Bill of Rights.

Supplementary Recommendation 18:

The Task Force recommends that a new provision be inserted in Part II to clarify that minor procedural defects in the use of the Environmental Registry should not invalidate instruments issued through that process.

Supplementary Recommendation 19:

The Task Force recommends that the following miscellaneous provisions be incorporated in Part II of the Bill:

"Appointment of Mediator and ADR
Where the Minister is of the opinion that a mediator might assist in the resolution of issues related to the proposal and the applicant or the person subject to the control document or program approval consents, the Minister may appoint a mediator."

Supplementary Recommendation 20:

The Task Force recommends that the Minister have the authority to reclassify instruments from Class I to Class II if the issues in dispute merit an increased opportunity for public comment. The following approximately worded provisions are recommended for inclusion in the Bill:

"Where the Minister is of the opinion that the protection of the environment would be enhanced if a particular proposal for a Class I instrument was subject to public participation requirements prescribed for a Class II instrument, the Minister may designate that particular proposal for an instrument to be a Class II proposal.

Having made such a designation the Minister may prescribe the requirement for public participation for each class, including:

- (a) the time when notice of a proposal for an instrument may be placed on the Environmental Registry;
- (b) the manner in which any additional notice, apart from the placement of a proposal on the Environmental Registry, may be given to the public;
- (c) the manner in which the public may make comment on the proposal for an instrument;
- (d) the manner in which the public may obtain available information about the proposal for an instrument during the period for comment;
- (e) such other standards as the Minister may provide by regulation."

Supplementary Recommendation 21:

In its report at pages 57-60, the Task Force made specific recommendations for appeals of instruments. The Task Force recommends that express sections and authority to develop regulations be included in the Bill to give effect to these recommendations.

Supplementary Recommendation 22:

The Task Force recommends that the provisions which establish the office of the Environmental Commissioner ensure the independence of the Environmental Commissioner, his or her tenure, and the method of appointment and renumeration. The Task Force considers the seniority of this position to be equivalent to that of the Ombudsman or Provincial Auditor.

Supplementary Recommendation 23:

The Task Force recommends that Section 23(b) be amended to clarify that it is the function of the Environmental Commissioner to provide guidance to Ministries on how to comply with the requirements of the Environmental Bill of Rights and to help ensure that Ministries develop Statements of Environmental Values. The Task Force recommends that a provision be added to Section 23 which would state that it is a function of the Environmental Commissioner to report forthwith to the Legislature on a Ministry's failure to comply with the development of an adequate Statement of Environmental Values pursuant to Sections 5, 6 and 7 of the Bill.

Supplementary Recommendation 24:

Section 23(d) (e) (f) and (g) use the word "monitor" to describe the functions of the Environmental Commissioner. The Task Force agreed with submissions that this word was too vague and, therefore, recommends its replacement with a word that would emphasize the more active role contemplated for the Environmental Commissioner. The Task Force recommends that the word "monitor" be replaced with the word "review" in the above noted paragraphs.

Supplementary Recommendation 25:

Part VI of the proposed Environmental Bill of Rights creates a new civil cause of action for harm to public resources and reforms the law of public nuisance. A part of the model developed by the Task Force includes defences to the new cause of action. Section 42 sets out the defences of due diligence, compliance and reasonable interpretation of instrument. The use of the cause of action and the defences will need to be watched closely. The Task Force therefore recommends that the functions of the Environmental Commission enumerated in section 23 be expanded to include a specific duty to review the use of Part VI, the civil cause of action, including use of the various defences, use of the emergency exception and the role of the Attorney General in the litigation.

Supplementary Recommendation 26:

The Task Force was persuaded that a "biennial" report would be too infrequent to ensure political accountability. The Task Force, therefore, recommends that the Environmental Commissioner prepare annual reports to the Legislature and be empowered to make any other interim reports as the Commissioner considers necessary to deal with significant issues which may arise. The Task Force recommends that Section 24(1) be amended to refer to annual reports to the Speaker of the Assembly and that the report be laid before the Assembly forthwith upon receipt.

Supplementary Recommendation 27:

The Task Force recommends the inclusion of a new section, analogous to Section 10 of the Provincial Audit Act, requiring the various Ministries within the Provincial Government to cooperate with the Environmental Commissioner's inquiries.

Supplementary Recommendation 28:

The Task Force also recommends that the Environmental Commissioner have subpoena powers that would enable him or her to secure necessary information from government Ministries in order to prepare his or her report. The type of subpoena powers the Task Force contemplates would be similar to a subpoena duces tecum which requires the production under oath of books, papers and other documents or things. In this regard, the Task Force considered s.14 of the provincial Audit Act which, in part, is analogous. The Task Force does not recommend that the Environmental Commission have the power of search and seizure or the powers granted to Commissioners of Inquiry under the Public Inquiries Act.

Supplementary Recommendation 29:

The Task Force recommends that the Environmental Commissioner have the power to accept special duties as may be assigned to him or her by the Legislature.

In this regard, the Task Force considered Section 17 of the provincial Audit Act which is analogous.

Supplementary Recommendation 30:

Other provisions may be necessary to empower the Environmental Commissioner's Office and the Task Force therefore recommends that whatever authority may be needed to perform the functions contemplated in Part III be given to the Environmental Commissioner. In this regard the Task Force suggests reference be had to the general provisions of the Audit Act.

Supplementary Recommendation 31:

The Task Force recommends that Section 25(1) be amended to clarify that it applies only to the review of "prescribed" Acts, regulations or instruments.

Supplementary Recommendation 32:

The Task Force recommends that the word "scientific" be deleted from section 25(3) (c).

Supplementary Recommendation 33:

The Task Force recommends that Ministries develop guidelines for the assistance of the Environmental Commissioner in assessing the type of evidence that applicants could annex to Applications for Review. For example, evidence of the impact on health of an activity could be included with a Request for Review.

Supplementary Recommendation 34:

The Task Force agrees that the time frames originally proposed in the Environmental Bill of Rights should be reduced and that the Environmental Commissioner and various Ministries could respond more quickly to Applications for Review.

Supplementary Recommendation 35:

The Task Force also recommends that Section 27 be amended to include a requirement that the Environmental Commissioner shall send notice of an Application for Review of an instrument to the holder of that instrument. The notice should include adequate information about the Application such as the basis upon which the request is being made.

Supplementary Recommendation 36:

The Task Force recommends that section 28(2) be re-worded as follows:

"The Minister shall not review a decision made in the five years preceding the date of the application if the decision was made in accordance with Part II of this Act, unless there is new social, economic, scientific or other evidence that significant harm to the environment will occur if the review is not undertaken."

Supplementary Recommendation 37:

The Task Force recommends that s.28(3) be amended to require that where notice of a request for review of an instrument leads to a response from the holder of the instrument, it should be considered by the Ministry.

Supplementary Recommendation 38:

The Task Force recommends that the reference to written "notice" in section 29 be changed to "reasons". The reasons given should reflect the Minister's decision with respect to the public interest in Section 28(1).

Supplementary Recommendation 39:

The Task Force recommends that when a Minister has received several Applications for Review he or she should be able to prioritize the Applications and propose a plan for conducting them. This plan could be the subject of comment or review by the Environmental Commissioner.

Supplementary Recommendation 40:

The Task Force recommends that the reference to "residents" in subsection 32(1) be changed to "persons resident". "Persons resident" would include a corporation or other legal entity.

Supplementary Recommendation 41:

The Task Force agrees that the time frames originally proposed in the Environmental Bill of Rights should be reduced and that the Environmental Commissioner and various Ministries could respond more quickly to Applications for Investigations.

Supplementary Recommendation 42:

The Task Force recommends that section 35 be amended to clarify that a Minister can decline to investigate where to do so would duplicate an investigation of an alleged incident that has already been or started or completed.

Supplementary Recommendation 43:

The Task Force recommends that the introductory words of section 35 be amended to state that "...the Minister shall investigate all matters to the extent necessary in relation to a contravention alleged in an Application for Investigation. The original wording suggested that the Minister could exercise his or her discretion only with respect to whether an investigation would be done at all rather than as to the extent of the investigation. It would still be open to the Minister to decline an investigation if the criteria set out in Section 35(a), (b), (c) or (d) apply.

Supplementary Recommendation 44:

With respect to Section 36 the Task Force recommends that the Minister give written notice of the decision not to investigate and in the notice set out the reasons for refusing to undertake the investigation by referencing back to the criteria in Section 35(a) (b) (c) and (d).

Supplementary Recommendation 45:

The Task Force recommends that the expression "bring an action" in section 41 be amended to say "commence and maintain an action" and that the words "and is entitled to judgment" be followed by the words "if successful". "Resident" should be changed to "person resident". As a result, the sub-section would now read:

"Where a person has contravened or will imminently contravene a prescribed Act, regulation or instrument and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may commence and maintain an action against the person in the Court in respect of the harm and is entitled to judgment if successful."

Supplementary Recommendation 46:

The Task Force notes a typographical error in section 41(5). The reference to subsection 2 should be subsection 1. In addition, the Task Force recommends that the words "except as may be prescribed as a result of a federal/provincial agreement" be added to the end of subsection 5 so that it would now read as follows:

"Subsection 1 does not apply in relation to a contravention of an Act of Canada or a regulation or instrument under an Act of Canada except as may be prescribed as a result of a federal/provincial agreement".

Supplementary Recommendation 47:

The Task Force recommends that an amendment be made to the Bill clarifying that it was not its intention that section 41(7) should in any way eliminate, or affect in any way, the right to prosecute, in a criminal context, an alleged contravention of an environmental Act or a regulation. Public and private prosecutions of environmental offenses should continue to be available even if a Section 41 action has been commenced or finally determined in the civil courts. It is the Task Force's opinion that this section does not and should not have the affect of preventing prosecutions.

Supplementary Recommendation 48:

The Task Force is of the opinion that the Crown should be given notice of an action through the Attorney General's Office and that the Crown should then make a decision about its intended role in the litigation. The Crown may wish to join with the Plaintiff if it agrees with the allegations. The Crown may wish to join with the Defendant if it believes the claim is unnecessary or inappropriate or, in any other cases, the Crown may wish to act simply as an intervenor. The Task Force anticipates the Attorney General being involved in each case in some way unless the other parties agree that his or her participation is unnecessary. (See for example s.9(4) of the Judicial Review Procedure Act). The Task Force recommends that the Court have this flexibility to ensure the maximum participation of necessary parties for the proper adjudication of these claims, including the development of appropriate restoration plans.

Supplementary Recommendation 49:

The Task Force recommends that subsection 46(1) be redrafted to state as follows:

"s.46 (1) The Court may permit any person to participate in the action to provide fair and adequate representation of the private and public interests at stake.

(2) The Court may make any order it considers appropriate setting out the rights, including appeal rights, if any, of the persons with respect to participation in the action and Restoration Plan.

(3) No order shall be made under subsection (1) after the court has made an order under section 49.

(4) The Rules of Civil Procedure apply to actions commenced under section 41."

Supplementary Recommendation 50:

The Task Force recommends that the wording of section 49(2) be reconsidered to ensure that it is clear that no award of damages is available in this cause of action. A restoration plan can contemplate a monetary payment provided the conditions set out in Section 51(7) are satisfied. Section 49(2) should be amended to delete the reference to (d) and refer only to subsection (1).

Supplementary Recommendation 51:

The Task Force recommends that the reference to Section 2 of the Farm Practices Protection Act in section 49(3) be deleted and that the subsection read as follows:

"No order shall be made under this section that is inconsistent with the Farm Practices Protection Act".

Supplementary Recommendation 52:

The Task Force considered submissions concerning section 51 stating that the Courts in Ontario do not have sufficient judicial expertise or resources to design such potentially complicated plans. The Task Force does not anticipate a flood of litigation pursuant to this provision and does not consider the design of a restoration plan to be any more difficult or complicated than many of the other problems currently resolved by the sophisticated judiciary in this Province. If experience indicates there is a need for judicial education in the area of environmental law, then the Task Force recommends that such judicial education be provided.

Supplementary Recommendation 53:

The Task Force recommends that in section 51(2) the word "should" be changed to "shall" in the second line.

Supplementary Recommendation 54:

The Task Force recommends that section 58 be amended to clarify that the Attorney General's consent will no longer be required for commencing and maintaining an action in public nuisance for harm to the environment that leads to direct economic loss or direct personal injury.

Supplementary Recommendation 55:

The Task Force also recommends that Part VI of the Environmental Bill of Rights be amended to include a provision requiring court approval of any discontinuance, abandonment or other settlement of a Section 41 claim. In this regard, the Task Force recommends that a provision similar to Section 29 of the Class Proceedings Act be considered.

Supplementary Recommendation 56:

The Task Force recommends that a provision equivalent to section 189 of the Environmental Protection Act be considered for inclusion in the Bill. This would provide certain Crown employees with protection from lawsuits in connection with their day to day duties.

Supplementary Recommendation 57:

The Task Force recommends that the words "questioned or" be removed from subsection 74(1) so that it will now read:

"Except as provided in Section 41 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a Minister under this Act shall be reviewed in any court".

Supplementary Recommendation 58:

The Task Force recommends that in subsection 74(2) the availability of judicial review in Part II be clarified as follows:

"Any person resident in Ontario may make an application for judicial review under the Judicial Review Procedure Act on the grounds that a Minister failed to comply with the requirements of Sections 4, 15 or 16 respecting a proposal for an instrument".

Supplementary Recommendation 59:

The Task Force recommends that the 15 day time limit be increased to 21 days in subsection 74(3).

